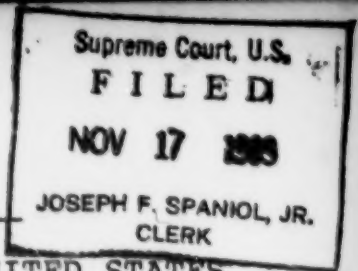


89-834 (1)
89-834



NO.:

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1989

ALTON B. SMITH,

PETITIONER,

versus

THE STATE OF SOUTH CAROLINA,

- RESPONDENT.

On Appeal From the United States Court
Of Appeals For the Fourth Circuit

PETITION FOR CERTIORARI - CIVIL CASE

W. GASTON FAIREY, ESQUIRE
FAIREY & PARISE, P. A.
Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

ATTORNEY FOR THE PETITIONER.

10 pp

QUESTION PRESENTED

Should the ineffectiveness standard of Strickland v. Washington be the sole criteria for determining that a criminal defendant is procedurally barred from raising the constitutionality of his conviction on a Petition for Habeas Corpus when the defendant insisted that his appointed appellate counsel raise the issue on direct appeal but counsel refused to do so?



TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
CITATIONS TO OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	12
APPENDIX.....	14



TABLE OF AUTHORITIES

	PAGE
<u>Jones v. Barnes</u> , 463 U.S. 745 (1983).....	6, 7, 9
<u>Murray v. Carrier</u> , 477 U.S. 478 (1986).....	7, 8, 10
<u>Smith v. State of South Carolina</u> , (unpublished Order of the Honorable Clyde H. Hamilton, United States District Court, entered December 16, 1988).....	2
<u>Smith v. State of South Carolina</u> , F.2d , No. 89-6519, 4th Cir. August 21, 1989.....	2, 11
<u>State v. Alton B. Smith</u> , 84-MO-120 (June 1, 1984) (unpublished opinion).....	2, 5
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	3, 6, 8
<u>Wainwright v. Sykes</u> , 433 U.S. 72 (1971).....	6, 7
<u>Washington v. Texas</u> , 388 U.S. 14 (1967); <u>In re: Winship</u> , 397 U.S. 358 (1970).....	11



NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1989

ALTON B. SMITH,

PETITIONER,

versus

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

On Appeal From the United States Court
Of Appeals For the Fourth Circuit

PETITION FOR CERTIORARI - CIVIL CASE

The Petitioner, Alton B. Smith,
prays that a Writ of Certiorari be issued
to review the judgment of the United States
Court of Appeals for the Fourth Circuit in
this case.

CITATIONS TO OPINION BELOW

The opinions relevant to this case



are reported in State v. Alton B. Smith, 84-MO-120 (1984) (unpublished opinion); Smith v. State of South Carolina, (unpublished Order of the Honorable Clyde H. Hamilton, United States District Court, entered December 16, 1988); Smith v. State of South Carolina, ___F.2d___, No. 89-6519, 4th Cir. August 21, 1989. All opinions are attached as an Appendix to this Petition.

JURISDICTION

The Court of Appeals issued its Opinion and entered its judgment on August 21, 1989. The Petitioner did not seek a rehearing in that court. He invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND

STATUTES INVOLVED

Article One, Section Nine of the United States Constitution provides "the



Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public safety may require it."

The Fourteenth Amendment to the United States Constitution states in pertinent part "nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The issue raised in this Petition is whether the refusal of appointed counsel to raise a constitutional challenge to a criminal defendant's conviction should procedurally bar that defendant from ever raising the issue unless the defendant can demonstrate ineffectiveness under the Strickland v. Washington standard.

Petitioner was charged with Criminal Sexual Conduct with a Minor in the First Degree, Accessory Before the Fact of



Criminal Sexual Conduct with a Minor in the First Degree, Criminal Sexual Conduct with a Minor in the Second Degree, Accessory Before the Fact of Criminal Sexual Conduct with a Minor in the Second Degree and Criminal Conspiracy. All charges arose out of a series of acts between Petitioner's girlfriend, Miriam Shull, and her son, Neil Shull. Petitioner was convicted under a theory of aiding and abetting on all charges on February 16, 1983, and sentenced to the maximum number of years on each charge, all charges to run consecutively to each other.

On direct appeal to the South Carolina Supreme Court, Petitioner was represented by appointed counsel, William Isaac Diggs. Mr. Diggs refused to raise the issue of whether the South Carolina Criminal Sexual Conduct statute was vague as applied to this Petition even though,

according to Mr. Diggs' later testimony, it "was the main thing" that the Petitioner insisted be raised. The South Carolina Supreme Court affirmed Petitioner's conviction, without opinion, pursuant to Rule 23 of the South Carolina Supreme Court Rules on the issues raised by appointed counsel. State v. Smith, Opinion No. 84-MO-120, (June 1, 1984). Petitioner then sought to raise the vagueness challenge in a state post-conviction relief action. That Petition was denied, as was his Petition for Certiorari to the South Carolina Supreme Court, to review that decision.

Petitioner subsequently filed a habeas corpus action in the United States District Court for the District of South Carolina. The District Court held Petitioner was barred from raising the vagueness challenge because of his prior

state procedural default on the issue on direct appeal. The United States Court of Appeals for the Fourth Circuit affirmed the District Court holding that Petitioner failed to establish ineffective assistance of counsel under Strickland v. Washington and, therefore, he did not meet the "cause" exception to procedural default and his claim was, therefore, barred by this Court's prior holdings in Wainwright v. Sykes, 433 U.S. 72 (1971) and Jones v. Barnes, 463 U.S. 745 (1983). The court held that as Smith's appellate counsel made a strategic decision in not raising the constitutional challenge, his performance did not fall below Strickland's objective standard of reasonableness. Having found Smith failed to establish the first prong of Strickland, the court did not address the merits of Smith's claim.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of

Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

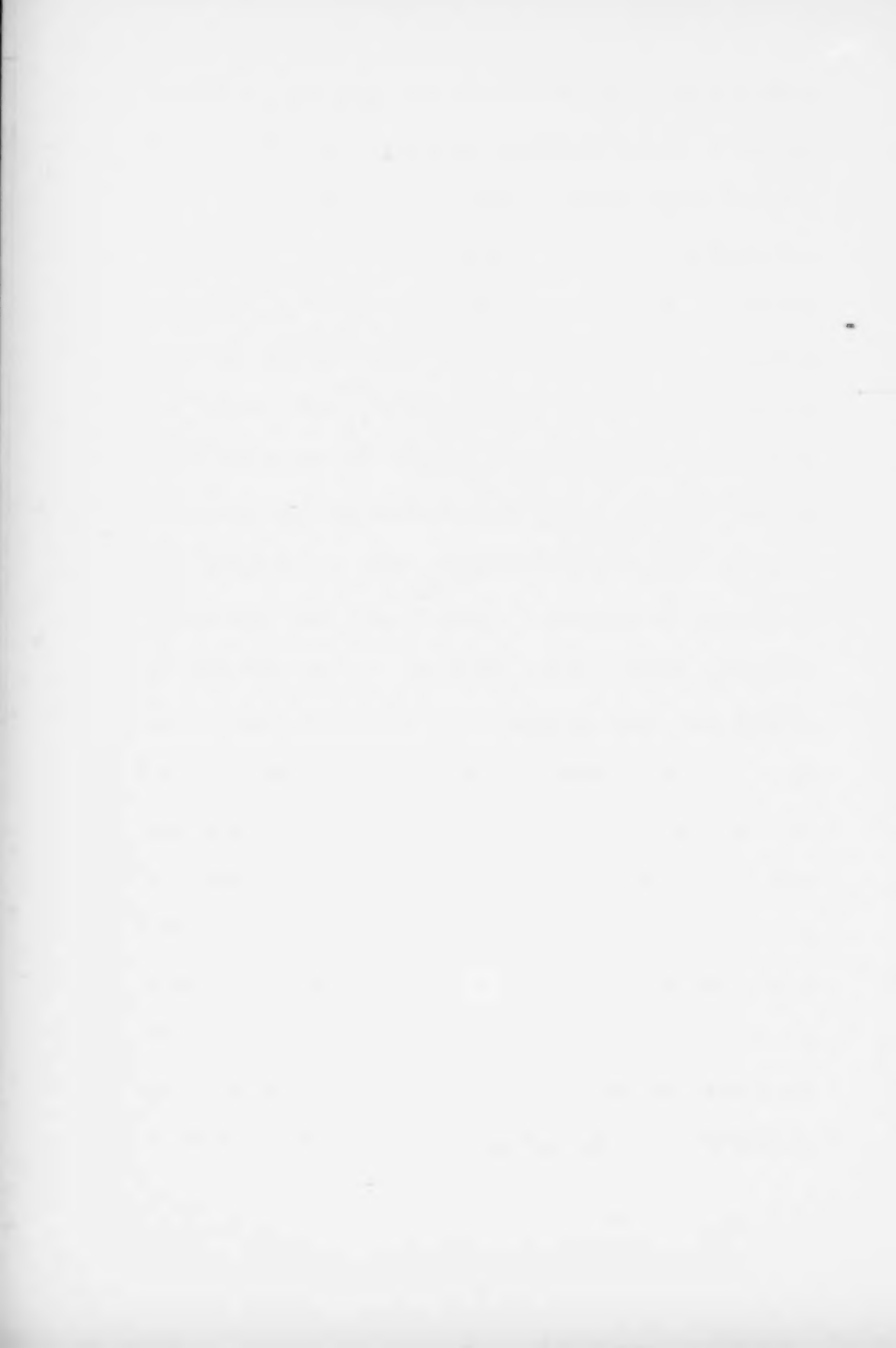
This case presents the scenario recognized but left unanswered in Jones v. Barnes. "[W]e have no occasion to decide whether counsel's refusal to raise requested claims would constitute 'cause' for a petitioner's default within the meaning of Wainwright v. Sykes." Jones at 754 n. 7.

The Fourth Circuit discounted Petitioner's argument based on this Court's decision in Murray v. Carrier, 477 U.S. 478 (1986), rendered three years subsequent to Jones. The Court of Appeals held that attorney error in failing to raise a claim equates with attorney refusal to raise a claim.

The Fourth Circuit focused on the policies of comity, finality and efficiency



underlying the decision in Carrier. Their concern about defense counsel "sandbagging" issues for future appeals, federal courts reviewing state court trials without benefit of state appellate review, and the potential increase in habeas corpus petitions in Federal court, led them to discount Petitioner's right to control his appeal. They held Petitioner's due process rights did not outweigh the potential of systemic problems. The Court of Appeals, finding Petitioner failed to establish a cause for his procedural default, analyzed his claim under the two prong test established in Strickland v. Washington, 466 U.S. 668 (1984), and found counsel's performance constitutionally adequate. The Court of Appeals found that "cause" in this situation could only be established by ineffective assistance of counsel under the standard of Strickland. As Petitioner's



appellate counsel had considered raising the issue insisted on by Petitioner and decided not to raise it, Petitioner's appellate counsel made a strategic decision and was, therefore, not ineffective.

The Fourth Circuit failed to recognize a defendant's right that Justice Blackmun recognized in his concurrence in Jones "... counsel's failure to raise on appeal non-frivolous constitutional claims, upon which the client insists, must constitute 'cause and prejudice' for any resulting procedural default under state law." Jones at 755 (emphasis added).

This Court has previously held that the distinction between a deliberate strategic decision ("a misjudgment") and an inadvertent omission ("an oversight") was "too tenuous a distinction to justify a regime of evidentiary hearings into counsel's state of mind in failing to raise



a claim on appeal." Carrier at 492. However, the distinction between such errors and an outright refusal to raise the issue is substantive and not a matter of semantics.

While this Court has held there is no constitutional inequity in requiring a client to "bear the risk of attorney error that results in procedural default," Carrier at 488, there is, however, constitutional inequity in requiring a client to bear a risk he explicitly chooses not to assume. As a matter of choice, a client generally looks to his attorney for advice and places his trust in the attorney's professional judgment. To strip away the right to choose to accept or reject that advice leaves the client with little or no control over his own destiny. A refusal to raise a non-frivolous issue implicates a defendant's right to present a



defense on his behalf under the Fourteenth Amendment's notion of a fundamental fairness embodied in the due process clause. See, Washington v. Texas, 388 U.S. 14 (1967); In re: Winship, 397 U.S. 358 (1970). If the opinion below is allowed to stand, a criminal defendant will be forever procedurally barred from raising a non-frivolous issue that he adamantly wants raised because counsel refused to present the issue.

While the Fourth Circuit ruling may promote comity, finality and efficiency, it does so at the expense of a criminal defendant's right to challenge the constitutionality of his conviction.

To evaluate counsel's refusal to present a non-frivolous defense "by the same standard as any other attorney error" (Smith at 8) the Fourth Circuit is confusing an attorney's legal error with an



attorney's ethical duty. Defense counsel's role is to advise his client. If a client refuses to follow that advice, he cannot be heard to complain of the consequences. In the end, it is the criminal defendant who must remain in jail, not his appellate counsel. It is fundamentally unfair to allow counsel to "trump" his client and forever preclude a defendant from raising the issue.

CONCLUSION

The record below unequivocally establishes that Petitioner was adamant about the vagueness challenge to the statute and that his counsel understood that was the "main thing" about which Petitioner was concerned. To allow a state procedural default to deny Petitioner the right to have his argument addressed on the merits elevates assistance of counsel to control by counsel.



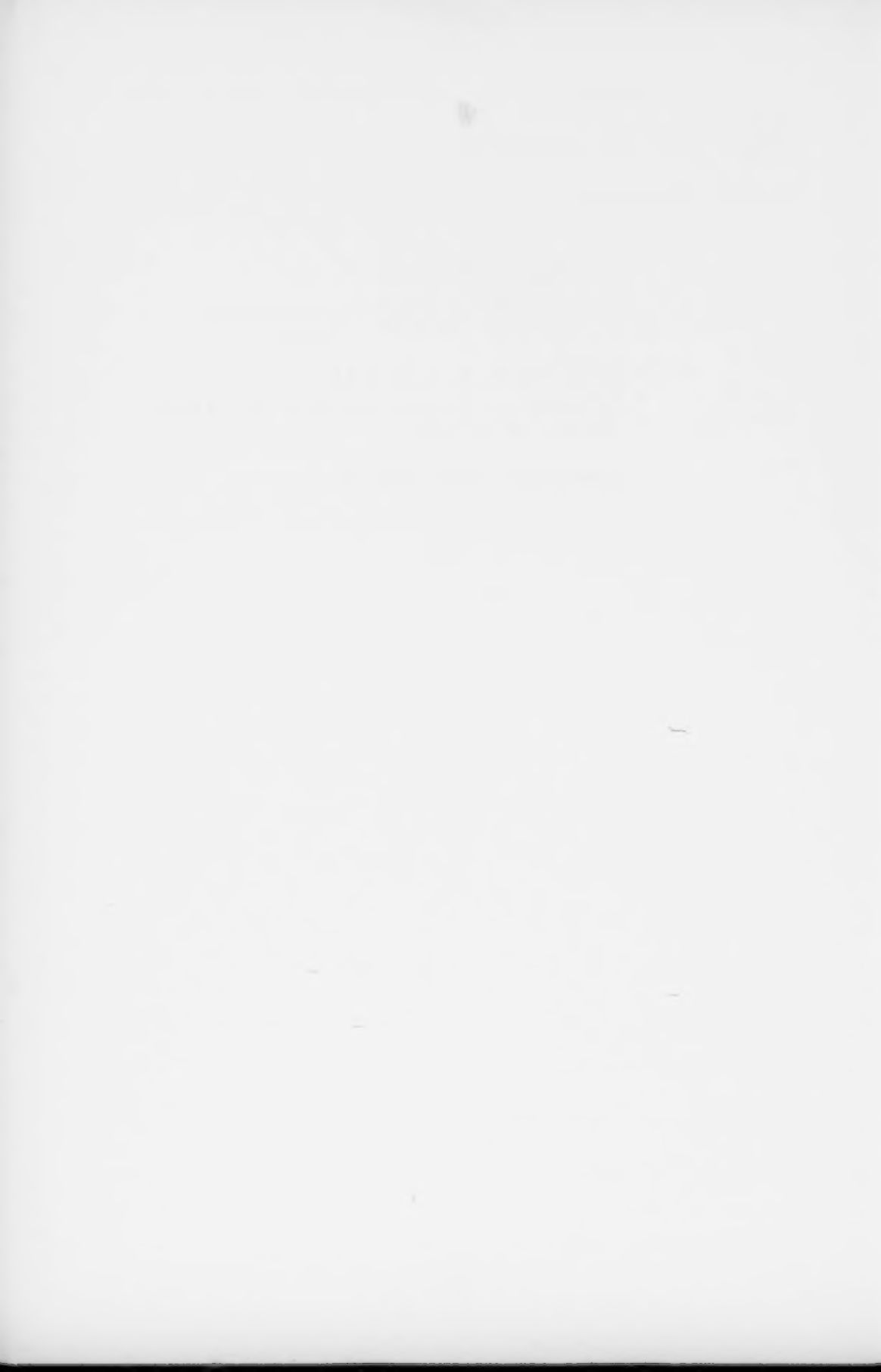
Respectfully submitted, this the
16 day of November, 1989, in Columbia,
South Carolina.

FAIREY & PARISE, P. A.

W. Gaston Fairey
W. GASTON FAIREY

Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

ATTORNEY FOR PETITIONER



I N D E X
F O R
A P P E N D I X

PAGE

State v. Smith, Opinion No. 84-MO-120,
filed June 1, 1984..... A.1

Smith v. State, Order of the Honorable
Clyde H. Hamilton, Judge of the
District Court, entered December
16, 1988..... B.1

Smith v. State, Fourth Circuit Court of
Appeals, Case No. 89-6519, Opinion,
dated August 21, 1989..... C.1



A.1

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,	v.	Respondent,
Alton B. Smith,		Appellant.

Appeal From Lexington County
Julius H. Baggett, Judge

Memorandum Opinion No. 84-MO-120
Submitted May 11, 1984 Filed June 1, 1984

AFFIRMED

Assistant Appellate Defendant William I. Diggs, of S.C. Commission of Appellate Defense, Of Columbia, for appellant. -

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Charles H. Richardson, all of Columbia; and Solicitor Donald V. Myers, of Lexington for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23.

C. BRUCE LITTLEJOHN C.J.

J. B. NESS A.J.

GEORGE T. GREGORY, JR. A.J.

DAVID W. HARWELL A.J.



B.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ALTON B. SMITH,)	C/A No. 3:87-2978-15(K)
)	
Petitioner,)	
)	
vs.)	ORDER
)	
STATE OF SOUTH)	
CAROLINA,)	
)	
Respondent.))	
_____)	

Petitioner, a state prisoner confined by the South Carolina Department of Corrections, has filed the present action seeking habeas corpus relief pursuant to 28 U.S.C. §2254.¹ Petitioner complains that his appellate counsel was ineffective in failing to raise the alleged unconstitutional vagueness of the South Carolina criminal sexual conduct statute, S.C. Code Ann. §16-3-655(1) and (2).

¹Petitioner is represented in this matter by W. Gaston Fairey, Esquire, of the South Carolina Bar.



Petitioner also complains that testimony relating to the admission of certain audio tapes and their presence before the trial jury violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The matter is currently before the court upon respondent's motion for summary judgment. Rule 56, Fed. R. Civ. Proc..

In accordance with 28 U.S.C. §636(b)(1)(B) and Local Rule 19.02(b)(2)(C), District of South Carolina, the matter was referred to Magistrate William H. Catoe, Jr., for a report and recommendation. The report and recommendation, as filed May 23, 1988, is before the court at this time. In his report, Magistrate Catoe recommended that respondent's motion for summary judgment be granted. The petitioner filed objections to the magistrate's report and



recommendation on June 1, 1988. Pursuant to 28 U.S.C. §636(b)(1)(C) the court must make a de novo determination of those portions of the magistrate's report and recommendation to which the petitioner has objected. Camby v. Davis, 718 F.2d 198 (4th Cir. 1983). After reviewing the record in this case, the magistrate's report and recommendation, the petitioner's objections thereto and the applicable law, the court concludes that the objections of petitioner are meritless. Therefore, the court is constrained to grant respondent's motion for summary judgment.

Petitioner, Alton B. Smith, and his girlfriend, co-defendant, Miriam Shull, were both convicted in state court of sexually abusing Shull's minor son, Neal Shull. The trial jury found that Ms. Shull had regularly engaged in criminal sexual conduct in violation of S.C. Code



\$16-3-655, and also found Smith guilty as an accomplice under the same statute.

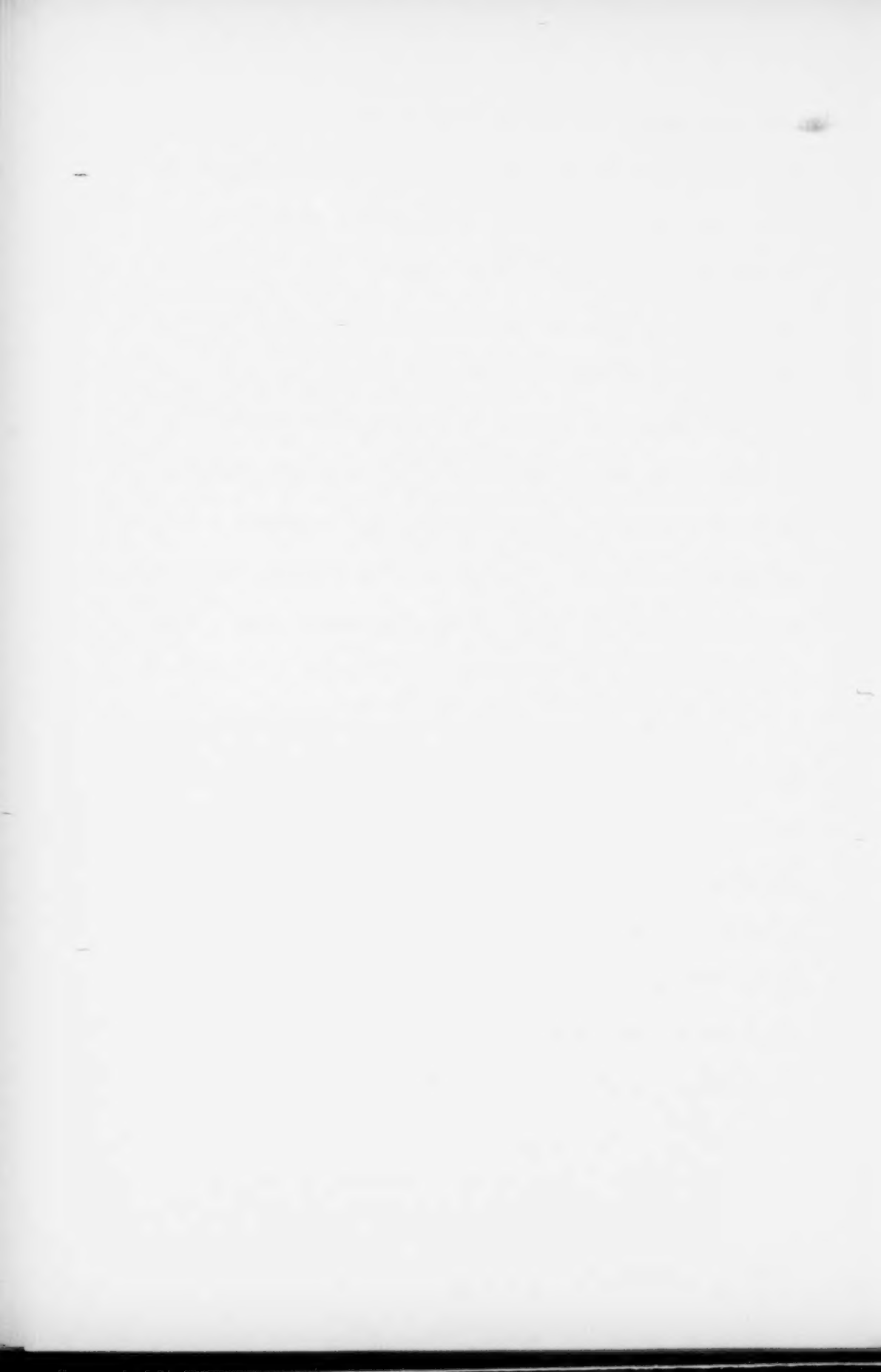
Petitioner was indicted at the February 1983 term of the Court of General Sessions for Lexington County, South Carolina, for the offenses of criminal conspiracy, criminal sexual conduct with a minor in the first degree, accessory before the fact of criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree, accessory before the fact of criminal sexual conduct with a minor in the second degree, and criminal sexual conduct with a minor in the second degree. His case was consolidated with that of co-defendant Miriam B. Shull, and the consolidated case proceeded to trial on February 15, 1983. On February 16, 1983, the jury returned a verdict of guilty as charged. Petitioner was subsequently sentenced to a term of



imprisonment of five years for conspiracy, thirty years for criminal sexual conduct in the first degree, thirty years for accessory before the fact of criminal sexual conduct in the first degree, twenty years for criminal sexual conduct in the second degree, twenty years for accessory before the fact of criminal sexual in the second degree, and twenty years for criminal sexual conduct in the second degree with each sentence to run consecutively.²

Petitioner first contends that South Carolina's criminal sexual conduct statute, S.C. Code Ann. §16-3-655, is unconstitutional and that his appellate counsel was ineffective in failing to raise this issue on direct appeal in state court. Specifically, petitioner submits that South Carolina Code §16-3-655(1) and (2) is

²The lengthy procedural history of this present petition will not be repeated in this order; rather, the court specifically adopts and incorporates by



unconstitutionally vague in that it does not clearly put a citizen on notice as to the criminality of certain acts.³

Respondent, on the other hand, argues the state court determined appellate counsel made informed strategic choices concerning which issues to raise on direct appeal and that those strategic choices do not constitute ineffective assistance of counsel. More particularly, respondent asserts that counsel's failure to raise the alleged unconstitutional vagueness of §16-3-655(1) and (2) does not constitute ineffective assistance of counsel because Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) held that appellate counsel had wide latitude in deciding what issues to raise on appeal and

reference the procedural history delineated on pages 2 through 8 of the magistrate's report.

³The criminal sexual conduct statute provides in pertinent part:

(1) A person is guilty of criminal



that appointed counsel need not raise every nonfrivolous issue asserted by the defendant. Respondent concludes that petitioner's appellate counsel made an informed strategic decision as to what

sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.

(2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.

S.C. Code Ann. §16-3-655(1) and (2). Sexual battery is defined under the statute as follows:

[s]exual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

S.C. Code Ann. §16-3-651(h).



issues to raise on appeal, which does not constitute ineffective assistance of counsel.

The magistrate concluded that petitioner's contention could not be considered by a federal habeas court. The magistrate determined that Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) required petitioner to show cause and prejudice for a procedural default before a federal habeas court could consider the claim. The magistrate further reasoned that only constitutionally ineffective representation under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established sufficient cause to raise this claim in a federal habeas court. Applying the performance prong of the Strickland test, the magistrate concluded that defense



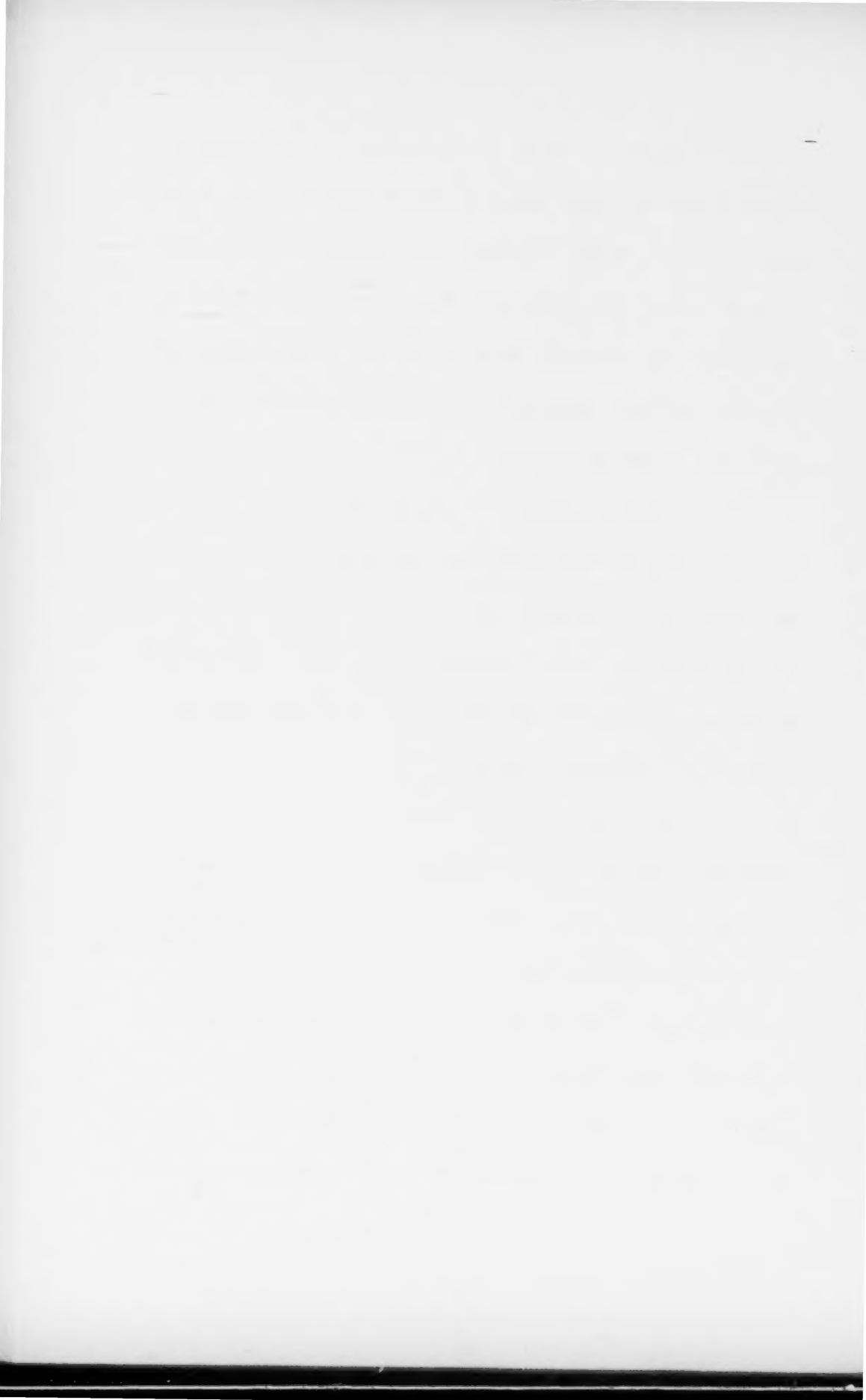
counsel was not required to raise every nonfrivolous issue requested by the defendant. Acknowledging that the findings of the state court as to the competency of counsel were not binding on a federal habeas court, the magistrate nevertheless concluded that the record as a whole supported a finding that petitioner's appellate counsel was competent.

In support of this conclusion, the magistrate noted that petitioner's appellate counsel was an experienced attorney who had handled over one hundred criminal appeals before handling petitioner's case, that counsel did raise four issues on appeal, and that counsel was very diligent in his preparation of this appeal. The magistrate also determined that South Carolina Code §16-3-655(1) and (2) was clear in its meaning and that, therefore, an appeal on vagueness grounds



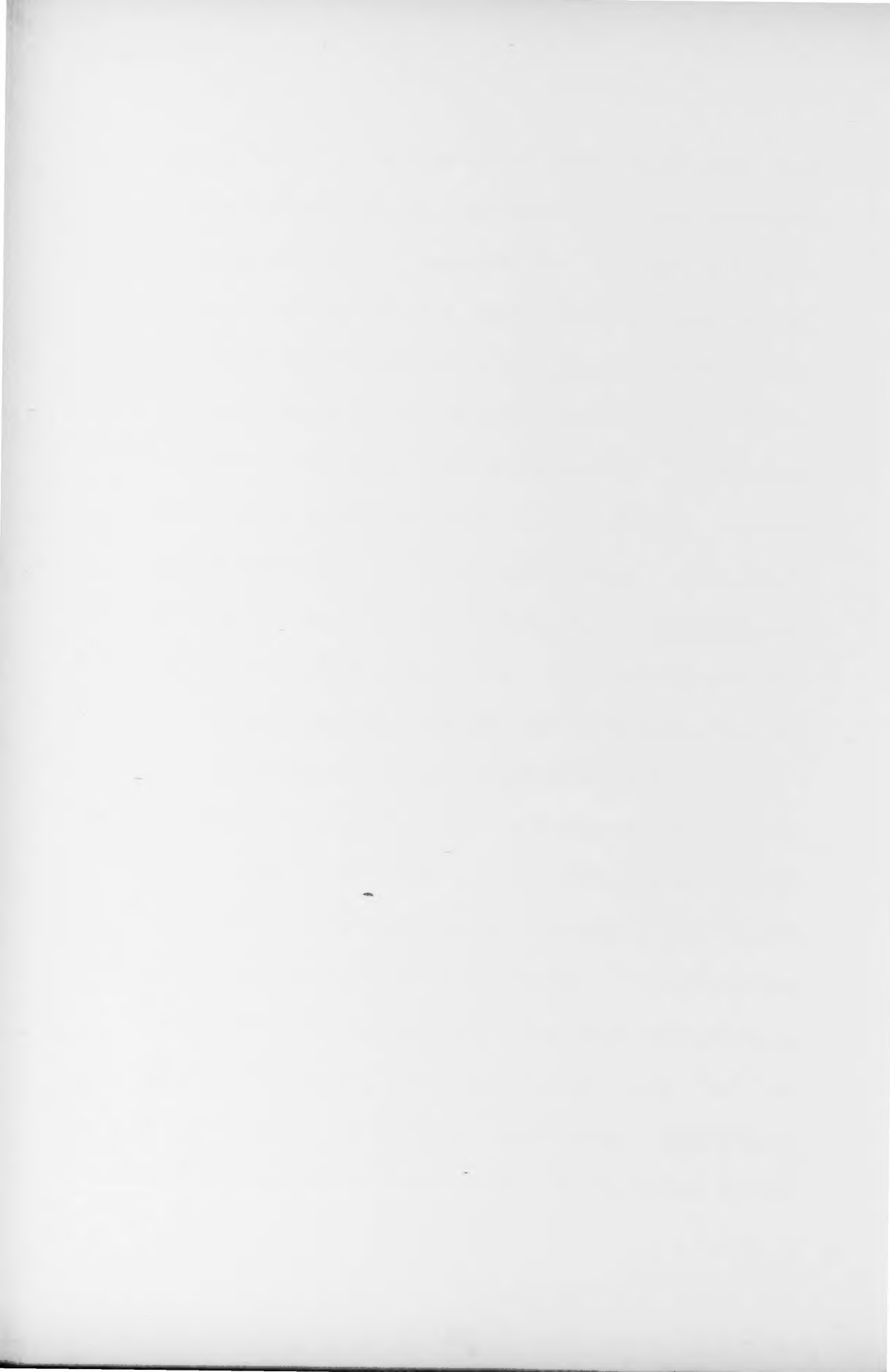
would have been totally frivolous. Accordingly, the magistrate concluded that petitioner had failed to show sufficient cause and prejudice for the procedural default to assert the alleged vagueness of the criminal sexual conduct statute in a federal habeas court.

Petitioner objects to the magistrate's recommendation and argues that he has taken every action within his power to preserve the issue of the statute's alleged unconstitutionality for review by a federal habeas court. In particular, petitioner contends that his appointed counsel refused to raise this issue to the South Carolina Supreme Court over his strenuous objection. Petitioner thereafter alleged that his appellate counsel had been ineffective in failing to raise the vagueness issue in his state court post-conviction relief action and in



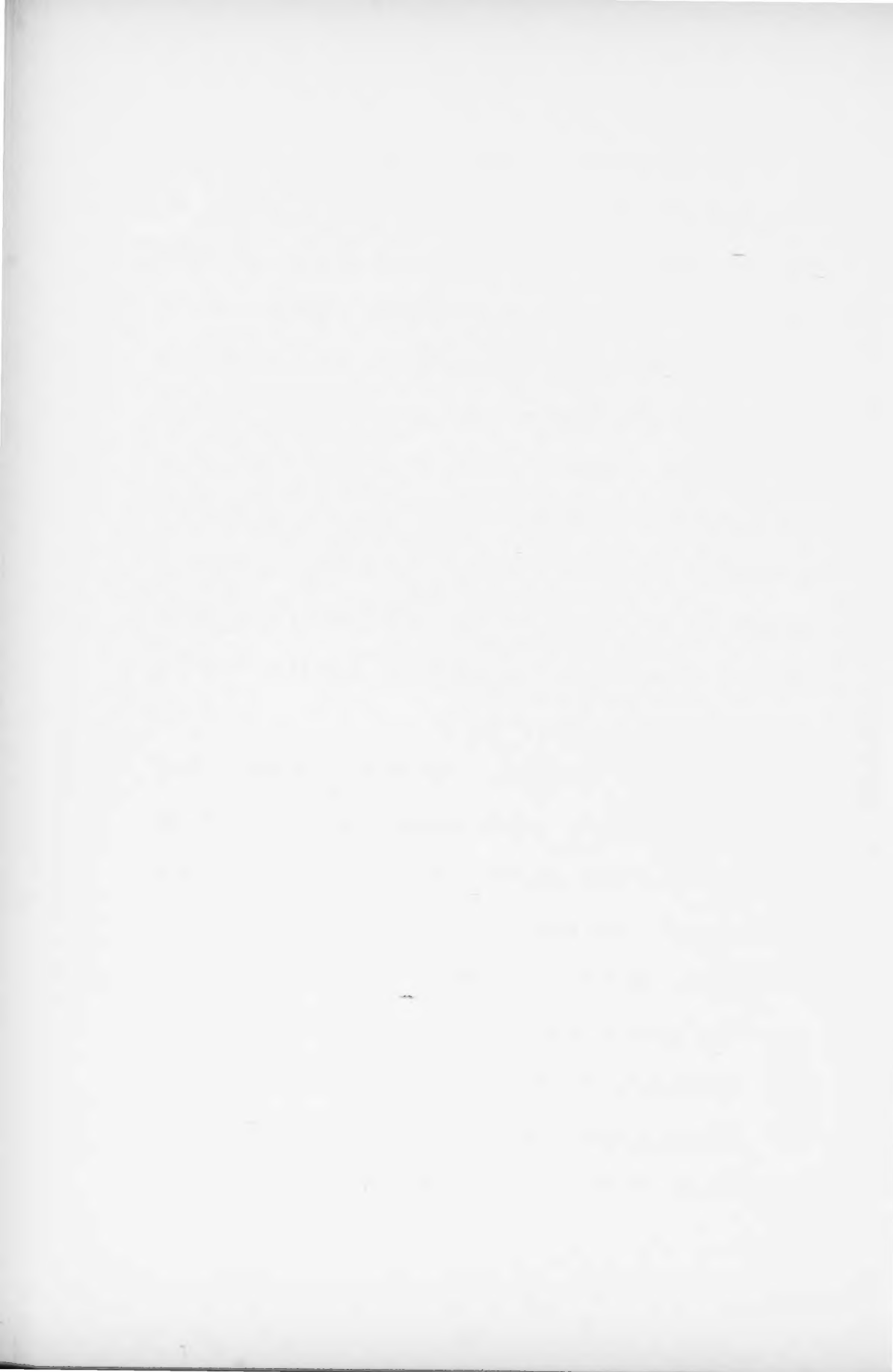
his petition for certiorari to the state supreme court following the post-conviction court's denial of relief. Consequently, petitioner argues that to foreclose review under the Strickland test deprives him the right of raising colorable claims due to counsel's reluctance to assert them in state court. Petitioner therefore concludes that the strict standard of Strickland should not be solely determinative of a cause and prejudice determination under Wainwright v. Sykes.

The petitioner also objects to the magistrate's conclusion that South Carolina Code §16-3-655(1) and (2) was not unconstitutionally vague as applied to the petitioner. Petitioner asserts that the magistrate has misinterpreted his argument as to the necessity of penetration or intrusion into the victim's body for a valid conviction under the criminal sexual



conduct statute. Petitioner argues that the statute does not put a female actor on notice that any sexual acts which do not include intrusion into the body of a victim would be considered as criminal under the statute. In short, petitioner apparently reasons that his conviction is not valid because the criminal sexual conduct statute was unconstitutionally vague as applied to Miriam Shull and thus cannot support petitioner's conviction as an accomplice.

The court agrees with the magistrate that petitioner has failed to show sufficient cause and prejudice for his procedural default in not raising this issue on direct appeal in state court. Because petitioner has failed to show that his appellate counsel was ineffective under the Strickland test, he has failed to establish sufficient cause to overcome his



procedural default and thus is barred from raising this claim in a federal habeas court.

A federal habeas court is prohibited from considering an issue not raised in state court unless the petitioner can show both cause and prejudice for the procedural default. Wainwright v. Sykes, supra. As more recently stated by the Court: "At a minimum, then, Wainwright v. Sykes plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim." Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 92 L.Ed.2d 1 (1986).⁴ Such extraordinary circumstances establish sufficient cause for procedural default only where counsel

⁴Commenting upon the thrust of its decision in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), the Court further noted: "the mere fact that

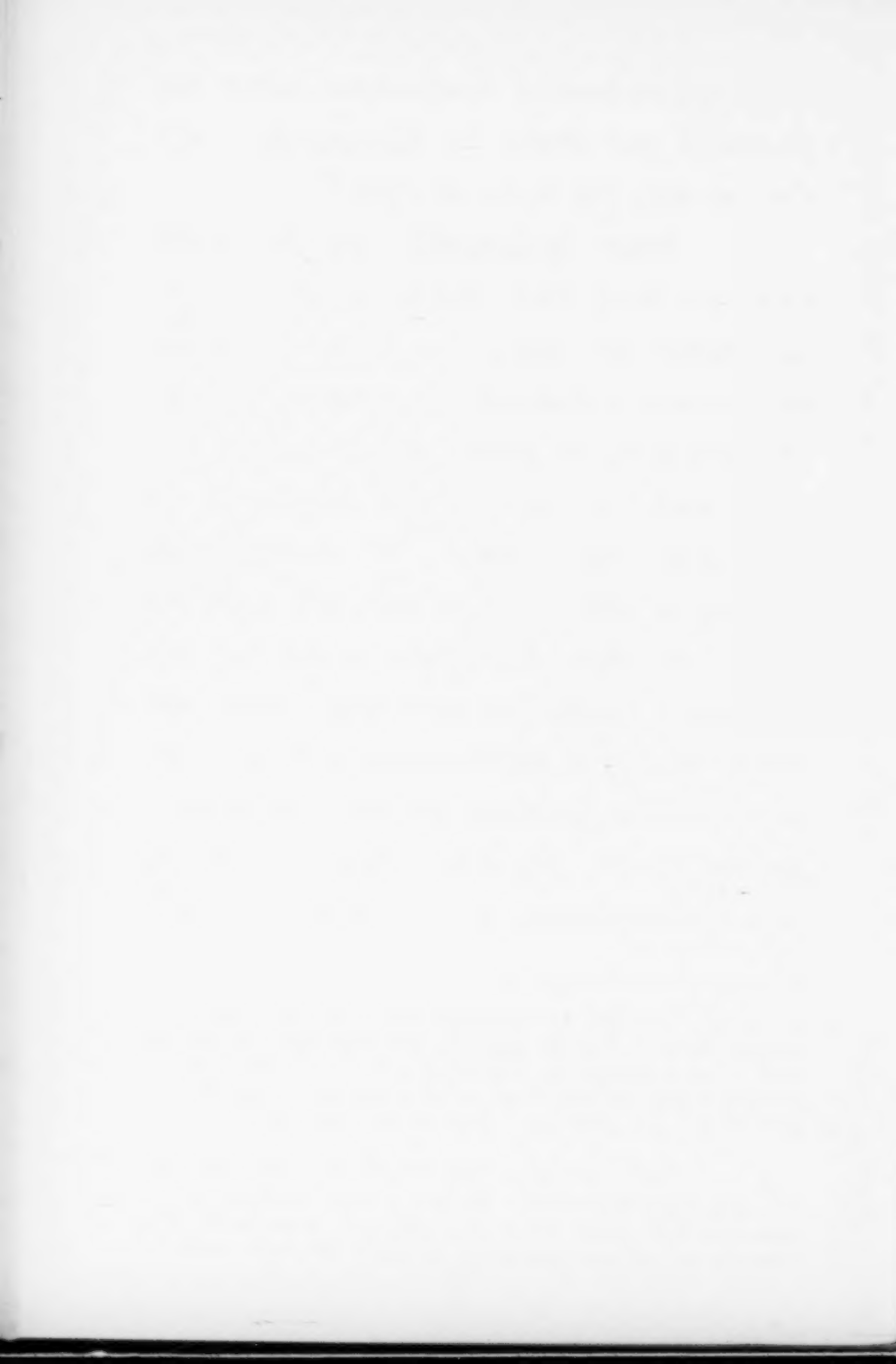


is constitutionally ineffective under the standards set forth in Strickland. 477 U.S. at 492, 106 S.Ct. at 2648.⁵

Under Strickland the petitioner must show both that counsel's performance was deficient and that such deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. at 2064. Significantly, the court need not address both components if the petitioner makes an insufficient showing on one. Id. at 697, 104 S.Ct. at 2069. To show sufficient cause for the procedural default, petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88, 104 S.Ct. 2064. In making this determination, a court must be highly

counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." 477 U.S. at 486-67, 106 S.Ct. at 2645.

⁵Of course, the Court's conclusion in Carrier squarely rejects petitioner's contention that the Strickland standard for ineffective assistance claims should not be



deferential to defense counsel's trial strategy and also strive to "eliminate the distorting effects of hindsight." Id. at 698, 104 S.Ct. at 2065. To facilitate these policy considerations, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Ordinarily, counsel's refusal to raise every nonfrivolous issue on appeal will not constitute ineffective assistance if, as a matter of professional judgment, counsel decides not to present this point. Jones v. Barnes, 463 U.S. at 751-54, 103 S.Ct. at 3312-14.

Application of these controlling principles to the present case unmistakably reveals that petitioner's appellate counsel was highly competent. The record shows

solely determination of a cause and prejudice determination under Wainwright.



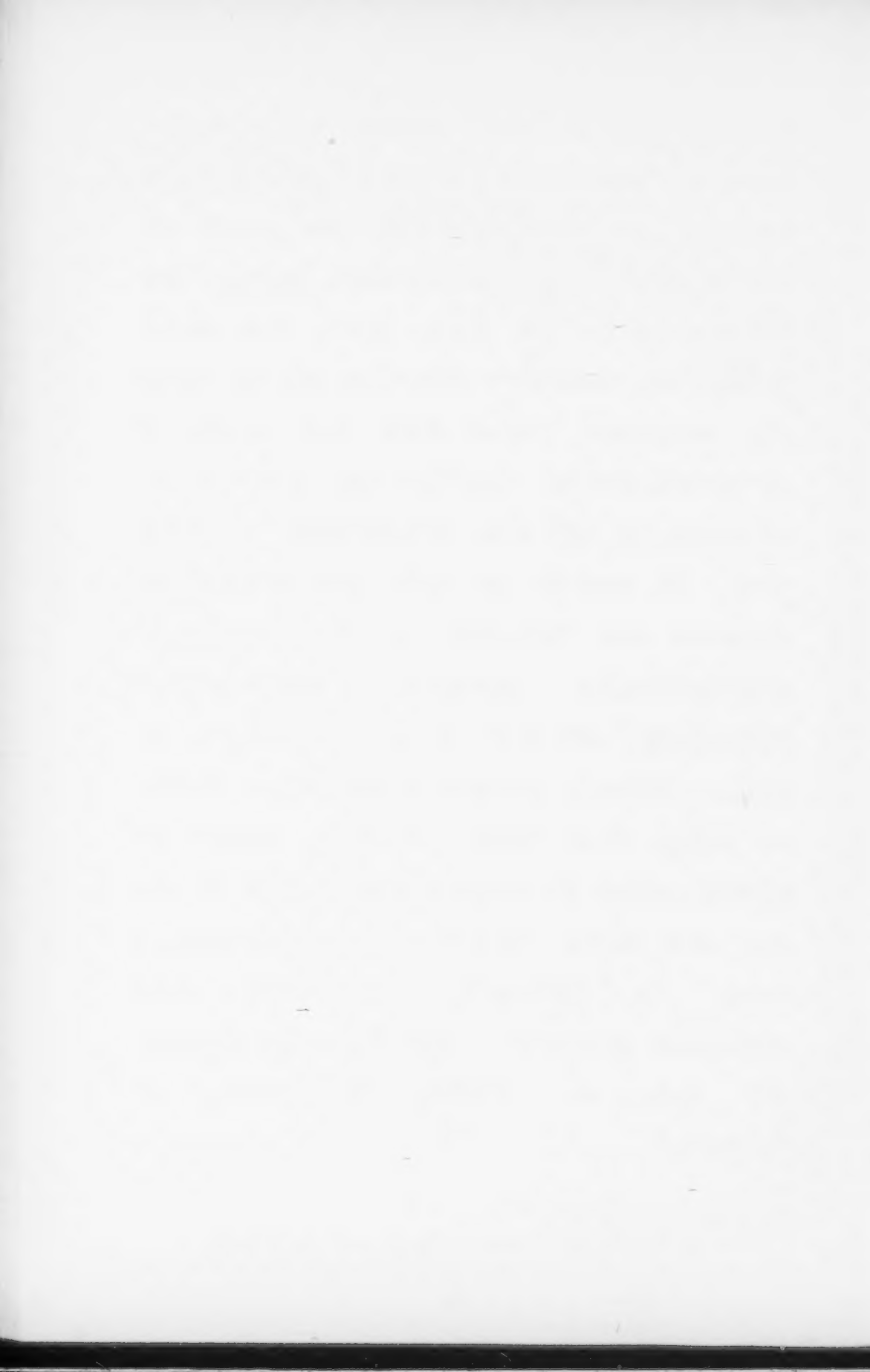
that petitioner and his appellate attorney discussed the alleged vagueness of the criminal sexual conduct statute on several occasions. Although petitioner wanted counsel to raise this issue on appeal, counsel ultimately determined, in his professional opinion, that this issue was not a good one to appeal to the South Carolina Supreme Court. Counsel did brief four issues to the state supreme court, however, the issue which in his professional judgment had the best chance of success. Moreover, it cannot be overlooked, as the magistrate found, that petitioner's appellate counsel was an experienced appellate attorney who had handled between 100 and 125 criminal case appeals prior to his handling of petitioner's appeal.

Although it may be tempting to question counsel's informed strategic



decision as to what issues to raise on appeal, especially given the ultimate decision of the state supreme court to affirm petitioner's conviction, Murray, 466 U.S. at 698, 104 S.Ct. 2065, the court finds that counsel's decision not to raise the vagueness issue does not establish constitutionally ineffective assistance. In light of all the circumstances of this case, it cannot be said the identified omission was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Indeed, counsel's strategic choice to raise four more promising issues on appeal, after thorough investigation of the law and facts relevant to petitioner's case, is typically considered good appellate practice. See Jones v. Barnes, 463 U.S. at 751-54, 103 S.Ct. at 3312-14.⁶

⁶As petitioner has not met his burden of proving deficient performance,



A brief review of petitioner's vagueness allegations confirms that his appellate counsel was competent.

Petitioner's theory that his conviction cannot be sustained because the state produced no evidence that the principal actor, Miriam Shull, had penetrated the victim's body is without merit. Petitioner cites State v. Mathis, 287 S.C. 586, 340 S.E.2d 538 (1986) for the proposition that a conviction under the criminal sexual conduct statute cannot be sustained without evidence that the actor penetrated the victim; however, the South Carolina Supreme Court affirmed Ms. Shull's conviction on the evidence found in the record revealing multiple incidents of anal and vaginal intercourse, as well as fellatio and cunnilingus, between Shull and her minor

the issue of whether prejudice occurred need not be reached.



son, Neal. State v. Miriam Shull, Memo. Op. No. 84-MO-51 (March 21, 1984). As the state supreme court has construed the sexual criminal conduct statute as gender neutral, it is not within the province of a federal habeas court to re-interpret the state statute otherwise. See 28 U.S.C. §2254(a).

Obviously, the Mathis court's reference to a requirement of penetration must be read by reference to the context to which it arose--a violation of the criminal sexual conduct statute by a male actor. A requirement of penetration by male actors prevents prosecution for acts arguably sexual in nature but nevertheless not involving some sort of intrusion. Thus, the Mathis court's requirement that a male actor achieve penetration is both logical and well founded. Nonetheless, because the state supreme court upheld a female



conviction under the statute, where penile penetration by the actor is a physical impossibility, also reveals that court's intention that penile penetration not be necessary for the valid conviction of a female actor under the statute. Furthermore, adoption of petitioner's argument--that the actor must penetrate the body of the victim--would preclude conviction of any female actor under the statute due to the physical impossibility, absent use of a bodily extremity or artificial device or object, of penetration by a female actor.⁷

Consequently, the applicability of the statute to female actors is clear and unambiguous. As Ms. Shull's conviction under the criminal sexual conduct statute is valid, it is likewise clear that petitioner could be validly convicted as a

⁷To read the statute as not applicable to female actors would also require this court to ignore the gender neutral language used in these provisions.



an accomplice under this same statute.

Petitioner has thus failed to establish sufficient cause to overcome the procedural default of not raising the alleged unconstitutionality of the criminal sexual conduct statute on his direct appeal in state court. Moreover, petitioner's vagueness allegations are without merit. The statute was clearly intended to and has been applied to female actors. The valid conviction of Miriam Shull, therefore, provides the necessary basis for imposition of accomplice liability as to petitioner.

Petitioner also contends that his conviction was obtained through the

For example, section 16-3-655(1) and (2) both refer to "person," rather than merely to "male persons." Section 16-3-651 also provides that an actor under the statute is any "person" accused of criminal sexual conduct. Consequently, the state supreme court's conclusion that the statute applies to female actors appears well supported by the statutory language itself.

introduction into evidence of audio tapes which were initially visibly exposed, but not played to, the jury, and later withdrawn after the trial judge determined the tapes had been acquired as the result of an unconstitutional search and seizure. Respondent on the other hand, apparently concedes that the admission of the tapes was improper, but nevertheless argues that such error was harmless because the jury was never exposed to the contents of the tapes and because the existence of the tapes was testified to by the victim's own testimony.

The magistrate concluded that petitioner's Fourth Amendment claim was without merit. Although acknowledging that a prosecutorial witness, Officer Vaughn, made reference to audio-tapes found in the petitioner's residence in front of the jury, the magistrate found that the tapes



were never played to the jury. In addition, he determined that the victim testified both that the petitioner made audio tapes of the sex sessions between the parties and that the victim had listened to some of the tapes and confirmed that petitioner's voice was on the tapes. Consequently, the magistrate concluded that Officer Vaughn's testimony concerning the tapes was merely a cumulative reference and was thus harmless.

Petitioner objects to the magistrate's recommendation and urges the court to apply the Chapman harmless error doctrine to the admission and subsequent exclusion of the audio tapes. Asserting that the magistrate erroneously determined the objection was only to the testimony of Officer Vaughn, petitioner argues that his objection goes to all testimony relating to the tapes and their presence before the



trial jury, even for a brief period. Petitioner thus concludes that the burden upon the state is to demonstrate that the admission of the tapes had no effect upon the verdict in the case.

While the magistrate may be entirely correct in asserting that the evidence by Officer Vaughn was merely a cumulative reference and thus harmless, the court is nonetheless barred in any event from considering petitioner's Fourth Amendment claim under Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Stone bars a federal habeas court from granting relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim." Id. at 494, 96



S.Ct. 1t 3052. The Court reasoned that, in the context of a federal habeas corpus challenge to a state court conviction, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal cost of the application of the rule persists with special force." Id. 494-95, 96 S.Ct. at 3052-53.

In Doleman v. Muncy, 579 F.2d 1258 (4th Cir. 1978), this circuit held that Stone's requirement of "an opportunity for full and fair litigation of a Fourth Amendment claim, " 428 U.S. at 494, 96 S.Ct. at 3052, is met when state procedures provide a meaningful vehicle for a prisoner to raise a Fourth Amendment claim. In Doleman, the requirement was met because the prisoner had an opportunity to present his Fourth Amendment claim through a motion to suppress at his state criminal trial,



and through an assignment of error on appeal once the motion was denied. 579 F.2d at 1265.

Like Doleman, petitioner was given an opportunity and did move to suppress the evidence relating to the audio tapes at his trial. Once the trial court granted petitioner's motion to suppress, petitioner also appealed the trial court's denial of his motion for a mistrial to the state supreme court. Consequently, petitioner has been afforded both the opportunity to raise his Fourth Amendment claim in the trial court and as an error on appeal. Petitioner has thus been afforded an opportunity to litigate his claim in state court within the meaning of Doleman, and thus is barred from raising his Fourth Amendment claim in a federal habeas court.

The Doleman meaning of full and fair litigation was reaffirmed in Grimsley



v. Dodson, 696 F.2d 303 (4th Cir. 1982).

In that case, the trial court rule against the defendant on his Fourth Amendment claim which ruling was affirmed by the Virginia Supreme Court's refusal to grant a writ of error. Id. at 304. Refusing to consider the petitioner's Fourth Amendment challenge to his conviction, the court stated:

[o]nce the determination was made that Grimsley had the opportunity for a full and fair consideration of the question in state court and that such opportunity was not impaired, the district court should not have inquired further into the merits of a petitioner's Fourth Amendment claim.

696 F.2d at 304-05. Likewise, petitioner here was given and availed himself of the right of direct appeal on his Fourth Amendment claim to the South Carolina Supreme Court and thus is barred from raising this issue in a federal habeas corpus petition.



Nor can petitioner overcome the Stone procedural bar simply by showing error--whether a fact or law--in the state court's determination of his Fourth Amendment claim. As stated in Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982):

[w]e decline--as did the district court--to conduct the review that Sneed thereby invites. Stone v. Powell, of course, must contemplate that a federal habeas court may make any threshold inquiry needed to satisfy itself that the full and fair opportunity to litigate in state court upon which its rule of deference is predicated has not been impaired, but the ultimate rule of deference would of course be swallowed if impairment in this sense could be shown by showing error--whether a fact or law--in the state court proceeding.

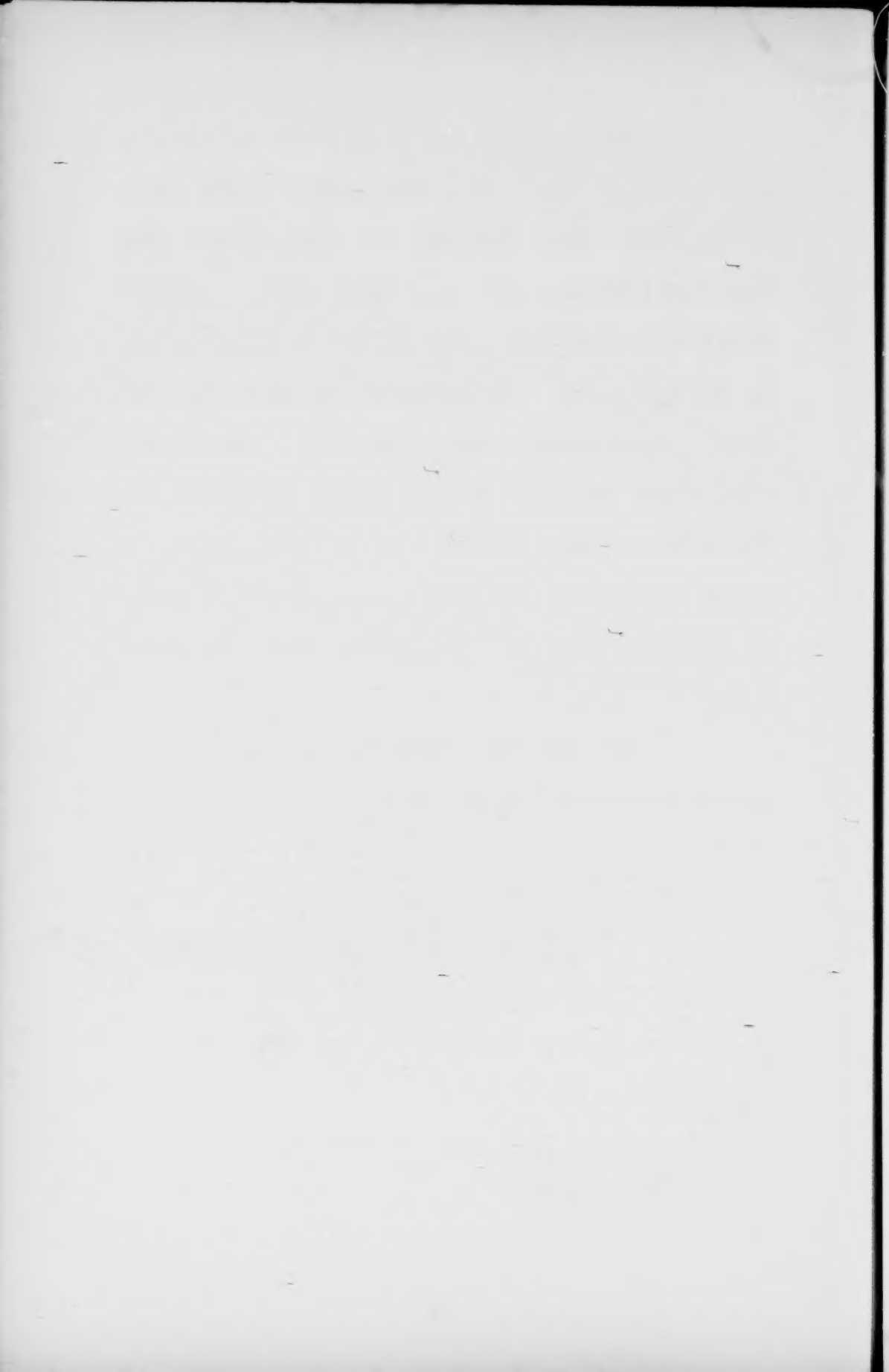
Id. at 1355-56. Accordingly, this court is barred from entertaining petitioner's Fourth Amendment challenge to the alleged admission of audio tapes seized in violation of the Fourth Amendment.



Based upon the foregoing reasoning and cited authorities, the court finds that petitioner has failed to establish the ineffectiveness of his appellate counsel under the standards set forth in Strickland v. Washington. Petitioner is also barred from asserting his Fourth Amendment challenge to his state court conviction. Therefore, the court is constrained to grant petitioner's application for a writ of habeas corpus. Rule 56, Fed. R. Civ. Proc.

IT IS SO ORDERED at Columbia, South Carolina, this 17th day of December, 1988.

CLYDE H. HAMILTON
UNITED STATES DISTRICT JUDGE



**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 89-6519

ALTON B. SMITH,
Petitioner-Appellant

versus

STATE OF SOUTH CAROLINA,
Respondent-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Clyde H. Hamilton, District Judge. (C/A 87-2978-3)

Argued: June 9, 1989.
Decided: August 21, 1989

Before CHAPMAN and WILKINSON, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

W. Gaston Fairey (J. Christopher Mills; FAIREY AND PARISE, P.A. on brief) for Appellant; Donald J. Zelenka, chief deputy attorney general (T. Travis Medlock, attorney general, on brief) for Appellee.



SPENCER, District Judge:

Alton B. Smith appeals the district court's denial of his petition for habeas corpus pursuant to 28 U.S.C. §2254 (1986). We affirm the decision of the district court.

I.

An indictment brought at the February, 1983 term of the Court of General Sessions for Lexington County, South Carolina, charged Smith with one count of criminal conspiracy and five counts of violating South Carolina's criminal sexual conduct statute, S. C. Code Ann. §§16-3-651 to 659.1 (Law Co-op. 1985),¹ in

¹The relevant statutes provide:

§16-3-651 - Criminal sexual conduct: definitions



both the first and second degree and

(a) "actor" means a person accused of criminal sexual conduct.

(h) "sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except where such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

(i) "victim" means the person alleging to have been subjected to criminal sexual conduct.

§ 16-3-655 - Criminal sexual conduct with minors

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.

(2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.



as a principal as well as an accessory. The charges accused Smith and his girlfriend, co-defendant Miriam Shull, of forcing Shull's minor son, Gary O'Neal Shull, to participate in various sexual acts with his mother. The evidence at trial showed that there were over one hundred forced "sex sessions" between Gary and Miriam Shull in a four year period. On February 16, 1983, a jury found Smith guilty on all counts. The trial court sentenced Smith to consecutive terms of five years on the conspiracy count, thirty years for each of the two first degree counts, and twenty years for each of the three second degree counts.



On appeal to the South Carolina Supreme Court, Smith raised four issues: (1) whether the trial court improperly admitted irrelevant and prejudicial evidence; (2) whether the trial court improperly allowed the jury to view evidence which was later suppressed; (3) whether the trial court violated due process when it initially denied Smith's motion to suppress the evidence later excluded; (4) whether the trial court improperly denied Smith's request for a limiting jury instruction. However, Smith's counsel on appeal, William Diggs of the South Carolina Office of Appellate Defense, refused Smith's demand to argue that South Carolina's criminal sexual conduct



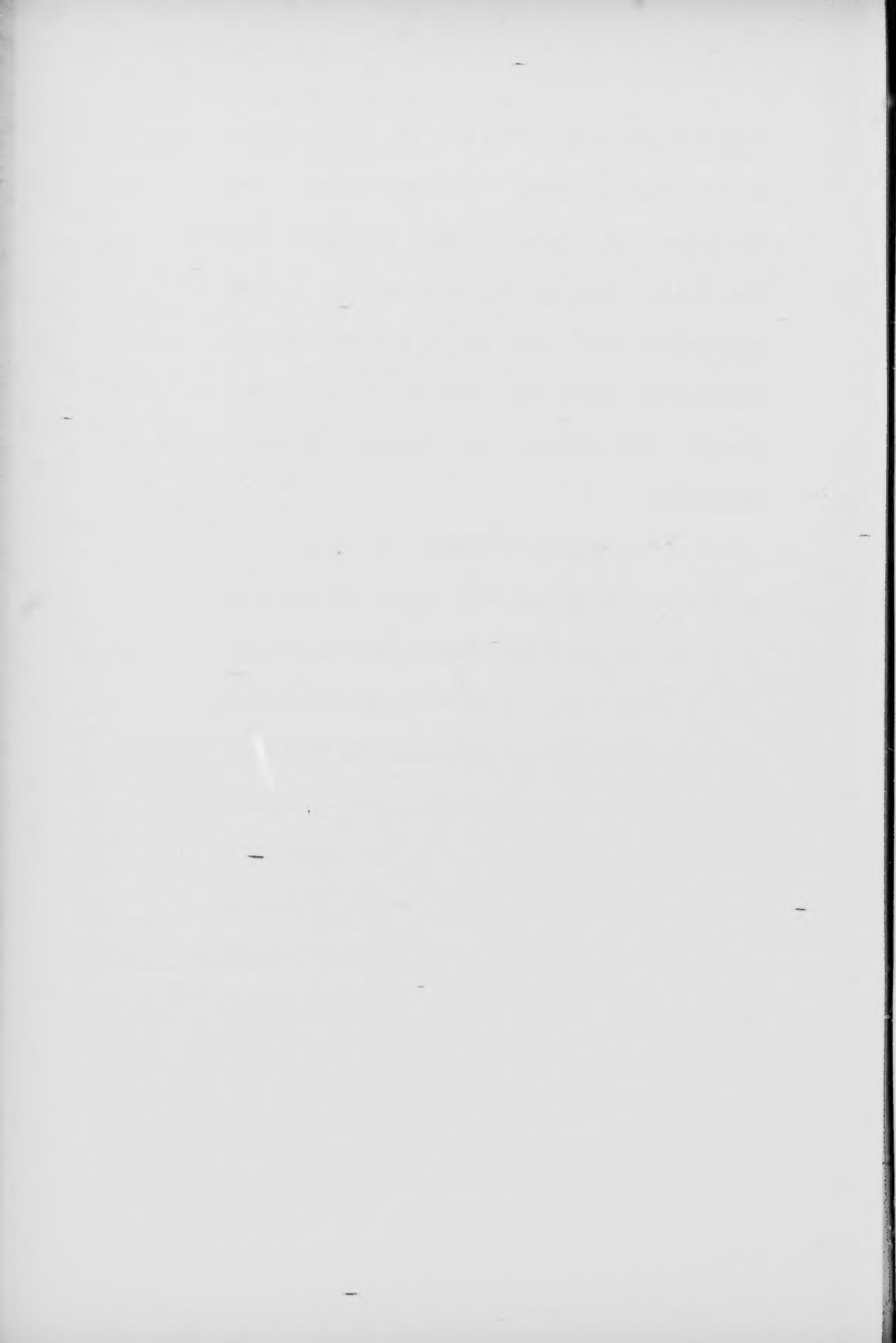
statute was unconstitutionally vague. Smith wished to argue that he had no notice that the statute encompassed sexual conduct where there was no penetration of the victim's body. He argues that the South Carolina Supreme Court's subsequent interpretation of the statute to require penetration of the victim, State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), demonstrates the reasonableness of his belief that his conduct was not criminal.

The South Carolina Supreme Court affirmed Smith's conviction on June 1, 1984. The United States Supreme Court denied certiorari on October 1, 1984. Smith filed an application for post conviction



relief pursuant to S. C. Code Ann. § 17-27-10 (Law. Co-op. 1985) on December 9, 1984. The application was dismissed on May 13, 1986. Smith appealed the dismissal to the South Carolina Supreme Court, but that court declined to hear Smith's appeal.

Smith then filed the present petition for writ of habeas corpus in federal court on December 11, 1987. The matter was referred to a United States magistrate William Catoe, who filed a report recommending dismissal of Smith's petition. By order entered December 16, 1988, the district court dismissed Smith's petition. The court found that Smith had failed to



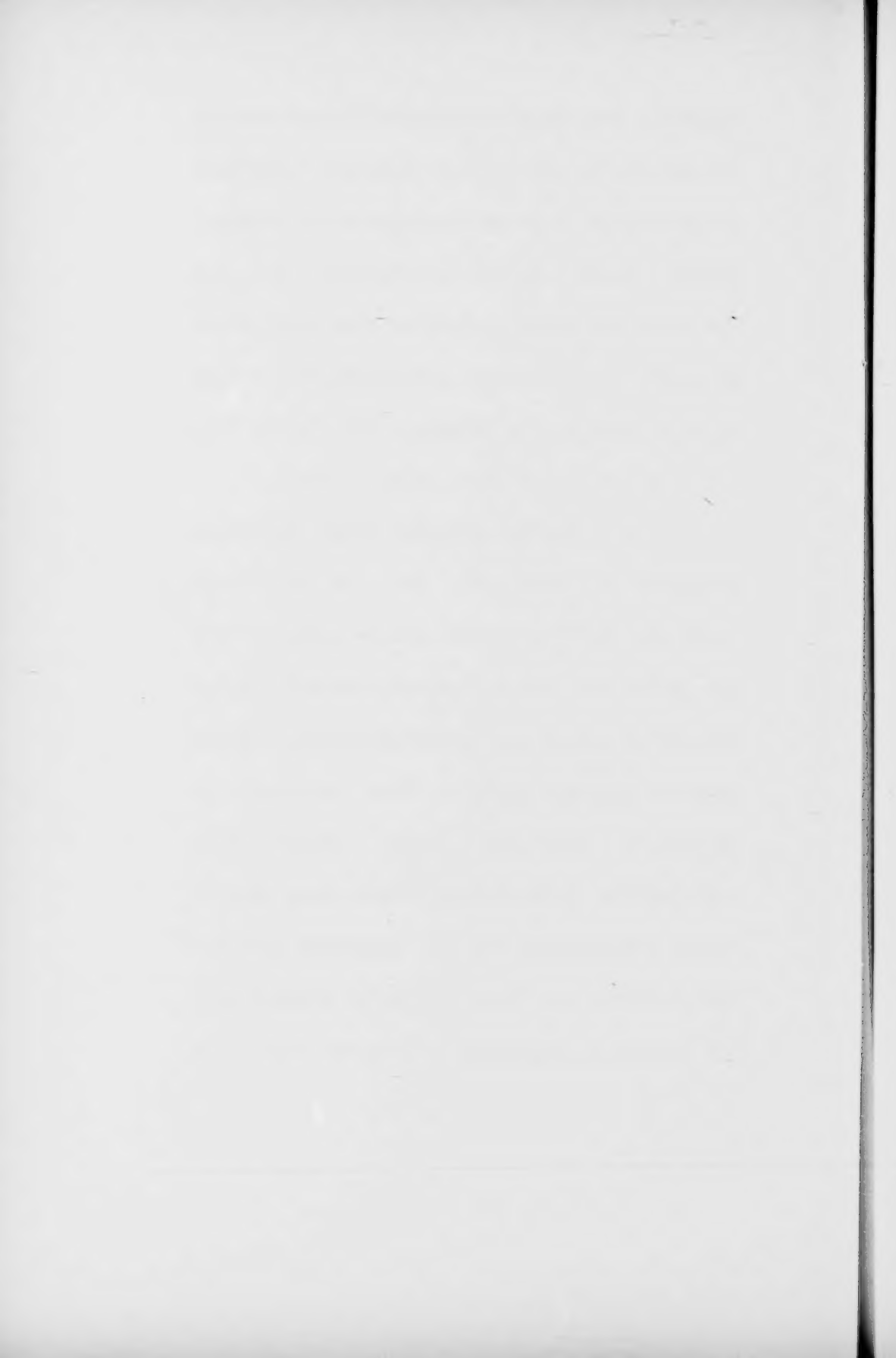
establish ineffective assistance of counsel. In addition, the court found that Smith had not shown sufficient cause for his failure to raise on direct appeal the claim that South Carolina's criminal sexual conduct statute is unconstitutionally vague and had not shown any prejudice resulting from that failure. This appeal followed.

II.

A petitioner in a federal habeas corpus action may not raise claims which have been defaulted under state procedural rules unless the petitioner can show cause for the default and prejudice resulting from the default. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). On direct

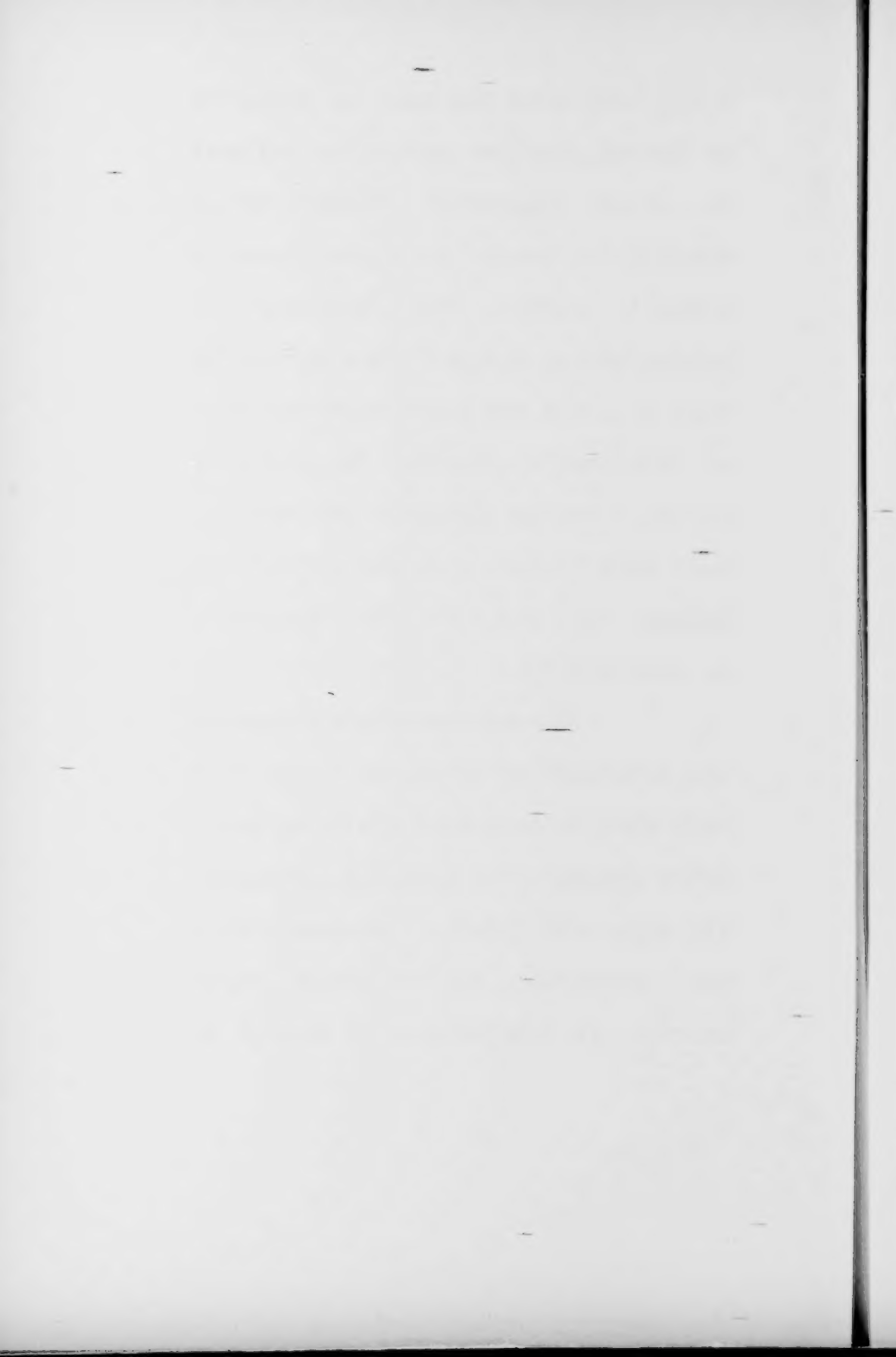
appeal, Smith did not challenge South Carolina's criminal sexual conduct statute as unconstitutionally vague. Thus, under South Carolina law, he is barred from raising the claim in a post-conviction proceeding. See e.g., Peeler v. State, 277 S.C. 70, 71, 283 S.E.2d 826, 826 (1981).

Smith argues that defense counsel's refusal to raise "the central nonfrivolous issue petitioner sought to have adjudicated" over Smith's insistence constitutes cause under Wainwright. The thrust of Smith's argument is that the situation presented here has never been addressed by the Supreme Court. He points to the Court's statement in Jones v. Barnes, 463 U.S. 745, 754



n.7 (1983) that "we have no occasion to decide whether counsel's refusal to raise requested claims would constitute 'cause' for a petitioner's default within the meaning of Wainwright v. Sykes." He also claims that at least one Justice agrees that an attorney's refusal to raise a claim, over his client's insistence, must constitute cause and prejudice. Barnes, 463 U.S. at 755 (Blackmun, J. concurring).

The Supreme Court addressed the question of attorney error in a very similar case decided three years after Barnes. In Murray v. Carrier, 477 U.S. 478 (1986), the respondent was convicted in Virginia state court. In his notice of appeal to



the Virginia Supreme Court, he included a claim that the trial court erred by refusing to allow him to examine the victim's statements prior to trial. However, his counsel failed to include that particular claim in the required petition for appeal. Pursuant to its rules, the Virginia Supreme Court refused to hear the claim, either on direct appeal or in a later state habeas corpus action. Id. at 482.

The Supreme Court held that Carrier had failed to show cause for that procedural default. "Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather



than at trial." Carrier, 477 U.S. at 492. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under [Strickland v. Washington, 466 U.S. 668 (1984)] we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Carrier, 477 U.S. at 488.

Carrier is based on policy considerations of comity, finality, and efficiency. Those considerations apply as strongly when a defendant insists on raising a particular claim and his attorney refuses as they do when an attorney inadvertently fails to raise a particular claim. Whether as a result of attorney refusal or



attorney error, the failure to raise a claim deprives the state court of an opportunity to review its errors and undercuts the state's ability to enforce its procedural rules. Further, consideration of new claims on collateral review reduces the finality of state convictions. Carrier, 477 U.S. at 491.

Similarly, just as in Carrier, permitting a petitioner to bring this type of claim on collateral review presents the distinct possibility that defense counsel might "sandbag" in order to avoid the state appellate courts. Allowing defense counsel to bypass the state appellate system simply by refusing to bring a claim encourages



counsel to manufacture refusals in order to obtain de novo review in federal court should the state appeal be unsuccessful. See Carrier, 477 U.S. at 492.

In addition, accepting Smith's position would increase the burden on district courts of federal habeas corpus. First, the absence of any state court appellate review forces district courts to review claims on an incomplete record. An important benefit of state appellate review is that it fully develops the factual and legal issues of a case very soon after the initial trial. Federal habeas corpus review, on the other hand, can occur years later, when those issues have become blurred



by the passage of time. Allowing claims not brought on appeal to be raised on federal habeas corpus places the federal court at a substantial disadvantage, increasing the possibility, however slight, of an erroneous decision.

Second, Smith's position would increase the burden of frivolous federal habeas corpus claims. Any conceivable claim which a prisoner's attorney had rejected on appeal would establish cause for procedural default. This class of claims would inevitably include frivolous claims as well as meritorious ones. Currently, such frivolous claims can be summarily dismissed for lack of cause.



Accepting Smith's argument would require a case by case determination as to the merits of each claim, substantially increasing the costs of federal habeas corpus. Moreover, judicial resources better spent on meritorious claims would be wasted on frivolous ones. As a result, the mass of marginal petitions may bury the few meritorious ones, reducing both efficiency and accuracy.

Thus, the Court holds that the refusal of appellate counsel to raise a nonfrivolous claim on direct appeal does not constitute cause for procedural default. Rather, such refusal should be evaluated by the same standard as any other attorney error. Accordingly, the Court will



determine whether Diggs' actions constitute ineffective assistance of counsel.

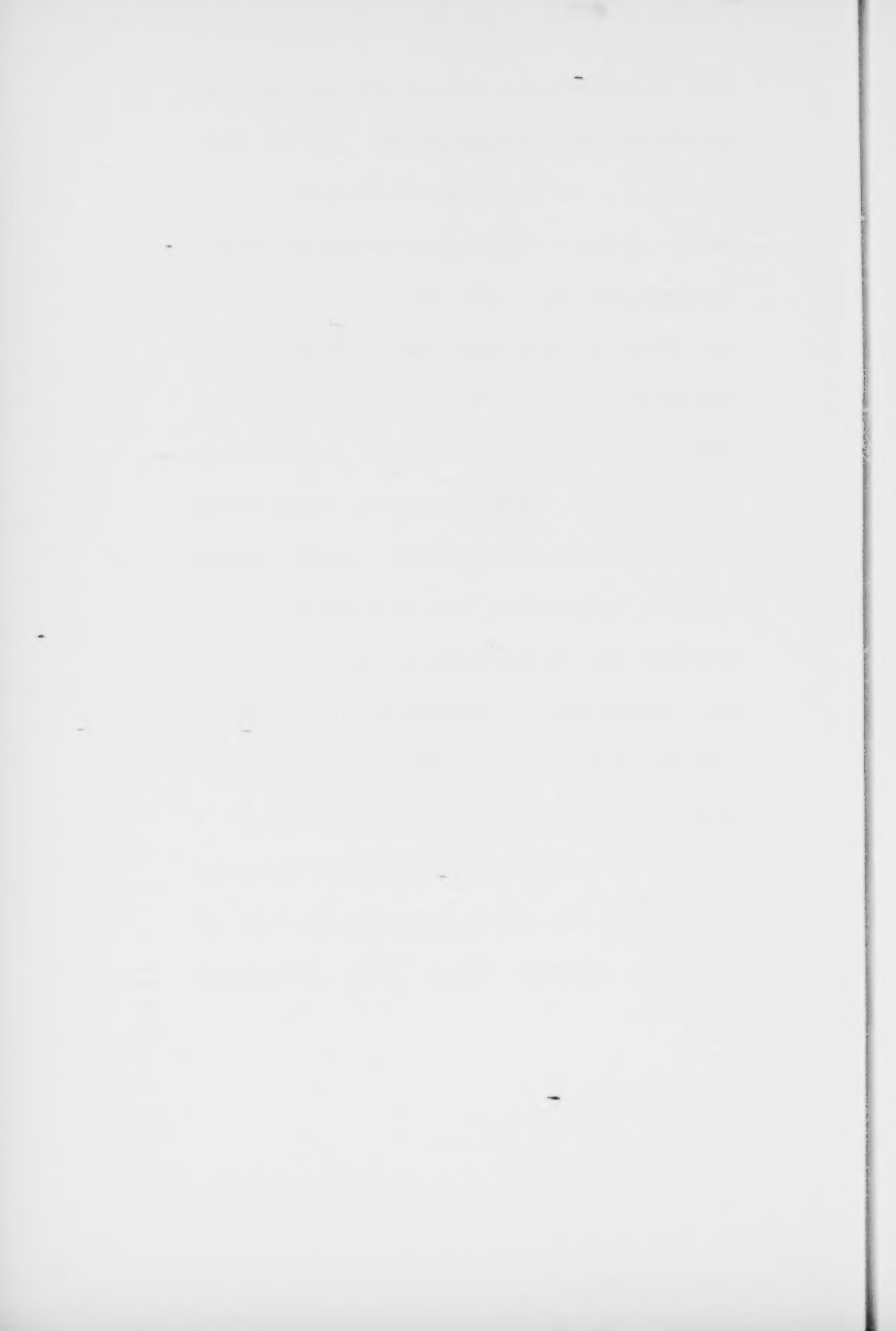
Under the two prong test established in Strickland v. Washington, a defendant alleging ineffective assistance of counsel must first show that counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. The court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Moreover, there is a strong presumption that the attorney's actions were within



the permissible range of reasonable professional assistance. Id. at 689.

Diggs' performance falls well within this permissible range of assistance. The record shows that he had extensive experience with appellate defense, that he met with Smith two to three times to discuss his appeal, and that he went over each potential claim with Smith before selecting the claims to bring before the appellate court. He made an informed, deliberate decision after reviewing the facts and the law and consulting with his client.

The Court does not deem it necessary to evaluate the merits of Smith's claim that the criminal



sexual conduct statute is unconstitutionally vague. The Court must only determine whether Diggs made a reasonable decision in refusing to raise the claim, and it is clear that he did so. First, the Mathis case, which Smith argues supports his claim, is factually distinguishable. It dealt with a violation of the statute by a male actor while this case involves a female actor. Second, Mathis does not purport to define "sexual intercourse" or "anal intercourse", two categories of outlawed conduct which occurred in this case. Third, neither Mathis nor the statute requires that there be evidence of



penetration or intrusion of the victim's body. There must merely be evidence of intrusion by one person into another person's body. See S.C. Code Ann. § 16-3-651(h); Mathis, 287 S.C. at 593, 340 S.E.2d at 541. Faced with a record replete with evidence of sexual intercourse between Miriam and Gary Shull, Diggs reached the reasonable conclusion that the vagueness argument had, at best, a marginal chance of success.

Thus, Diggs merely refused to raise a very weak claim, which is precisely the type of decision an effective advocate must make. "There can hardly be any question about the importance of having the appellate advocate examine the record with a



view to selecting the most promising issues for review." Jones, 463 U.S. at 752. "'Winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones, 463 U.S. at 751).

Diggs strategically (sic) elected not to raise the vagueness claim in order to avoid diverting the appellate court's attention from what he felt were stronger claims. Such a decision is "the very antithesis of the kind of circumstances that would warrant excusing a defendant's failure to adhere to a State's



legitimate rules for the fair and orderly disposition of its criminal cases." Smith v. Murray, 477 U.S. at 534.

Because Smith fails to establish the first prong of the Strickland test, the Court need not discuss the second prong. Accordingly, the Court holds that Smith received effective assistance of counsel on appeal and so fails to establish cause for his procedural default.

AFFIRMED